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NO. 80-6692

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

WILLIAM DURWOOD BUSBEE,

Appellant,

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER APPELLANT'S NOTICE OF APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS WAS TIMELY AND PROPERLY FILED?

II. WHETHER THE BASIS FOR DECISION BY APPELLEE CONSTITUTE INDEPENDENT AND ADEQUATE STATE GROUNDS?

III. WHETHER APPELLANT PRESENTS A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Appellee moves the Court to dismiss the appeal herein because (1) Appellant's petition for writ of certiorari was not timely and properly filed, (2) Appellant's petition does not manifest a substantial federal question, and (3) the lower court decision was based on adequate and independent state grounds; or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257 (2).

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

Appellant in the petition challenges the validity of Article 42.12 §3(d), V.A.C.C.P. That statute provides for deferred adjudication procedures and provides certain procedures for its implementation and termination.

Section 3(d) of Article 42.12 provides that a court may grant deferred adjudication for a person accused of committing a crime upon a plea of guilty or nolo contendere. The court hears evidence and finds that it substantiates the defendant's guilt, whereupon it defers further proceedings without entering an adjudication of guilt. Deferred adjudication may not exceed ten (10) years.

Appellant received such an adjudication with the stipulation that he commit no further violation of the law. The Appellant's deferred adjudication was revoked pursuant to a charge of possession of marijuana. He was then sentenced to a term of six years in the Texas Department of Corrections after an adjudication of his guilty in conformity with Article 42.12 §(3)d, V.A.C.C.P.

Appellant challenges the part of Section 3(d) that prohibits an appeal from a determination to adjudicate guilt when deferred adjudication was received pursuant to the statute.

THE PROCEEDINGS BELOW

The Appellant pled guilty to the felony offense of possession of more than four (4) ounces of marijuana at a hearing held before the trial court on May 25, 1978 (Tr. 1, 8). Pursuant to Section 3(d) of Article 42.12, Texas Code of Criminal Procedure, the trial court entered its order deferring adjudication of guilt and further proceedings, and placed him on probation for a term of five (5) years. One of the conditions of that probation was that he commit no further violation of law.

On June 9, 1978, the State filed a motion to revoke Appellant's probation and proceed with a determination to adjudicate guilt. Appellant was arrested, and a hearing on the State's motions commenced August 10, 1978, before the court.

The State's motion to revoke Appellant's deferred adjudication probation alleged that he had violated the terms of his probation by committing an offense, in violation of state law, by possessing marijuana.

The trial court ordered that Appellant's deferred adjudication be revoked, and proceeded to adjudicate Appellant's guilt sentencing him to a term of six (6) years in the Texas Department of Corrections. Appellant's motion for new trial was denied.

Appellant filed a notice of appeal that was not timely. However, the trial court found that good cause existed and allowed the appeal to be filed.

Appellant appealed to the Texas Court of Criminal Appeals on a number of grounds. The Court of Criminal Appeals dismissed Appellant's appeal by per curiam order delivered January 7, 1981. The court's decision was based on the fact that Article 42.12 §3(d), V.A.C.C.P. did not allow appeals from an adjudication of guilt, Appellant had failed to file a timely appeal and that the extension granted was not substantiated by the trial court record.

Appellant filed a motion for rehearing en banc. The Court of Criminal Appeals denied Appellant's motion for rehearing en banc on February 18, 1981. The Court of Criminal Appeals did not stay the issuance of its mandate, and Appellant is now in the custody of the Texas Department of Corrections. This appeal resulted.

I.

MOTION TO DISMISS

The State of Texas, Appellee herein, moves to dismiss this appeal on the grounds that (1) the federal question sought to be reviewed was not timely or properly raised; (2) the judgment rests on an adequate non-federal basis; and (3) the Appellant does not present a substantial federal question.

A. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY FILED.

The Appellant improperly seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. §1257 (2). Section 1257 (2) allows Appellant ninety days to appeal from the date of final decision by a state court in which to file a writ of certiorari.

The time for appeal or certiorari from a state court judgment in a criminal case is prescribed by rule of the Supreme Court, 28 U.S.C. 2102 (d). Proceeding for review should be instituted within the prescribed time, United States v. Hancock Truck Lines, Inc., 324 U.S. 774 and, if there is a failure to do so, the Court may dismiss the petition. Bomer v. Tennessee, 318 U.S. 771 and Samras v. United States, 317 U.S. 634 (1942).

In fact, this appeal from a criminal conviction is governed by Rule 20 (1), which prescribes a sixty day time period in which to file a petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort. An extension for good cause not to exceed 30 days may be granted by a Justice of the Court.

This is an appeal from the Texas Court of Criminal Appeals, the court of last resort in criminal cases in the State of Texas. The last judgment rendered by the Court of Criminal Appeals was the denial of a motion for rehearing en banc on February 18, 1981. Appellant filed notice of appeal with the Clerk of the Texas Court of Criminal Appeals on May 12, 1981. Eighty-three days elapsed from February 18, 1981 to May 12, 1981. No motion for extension of time was ever submitted. Thus, the Appellant's appeal is not timely and jurisdiction is not proper. Appellee moves this Court to dismiss Appellant's petition accordingly.

B. THE JUDGMENT OF THE STATE COURT RESTS ON AN ADEQUATE NON FEDERAL BASIS.

It is well established that a state decision is not reviewable by the Supreme Court, and the appeal may be dismissed where the record shows that although there may be a federal question in the case, there is also an independent question not federal in

character, decided by the state court, which in itself is broad enough to sustain the judgment. National Broadcasting Co., Inc. v. Niemi, 434 U.S. 1354 (1978) Dismissal is also proper if it appears that the decision of a federal question was not necessary to the determination of the cause or was not actually decided, Murdock v. City of Memphis, 20 Wall. 590, 636 (1874); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

The decision of the State of Texas was based on independent and adequate state grounds. The Texas Court of Criminal Appeals based its opinion on two grounds:

> (1) that Article 42.12 §3(d) V.A.C.C.P. did not allow the review requested by Appellant and
>
> (2) if it did, Appellant's notice of appeal was not timely.

First the Court found that Article 42.12 §3(d) did not allow an appeal to be taken from the decision to adjudicate guilt when one was being sentenced under the original deferred charge.

The court also held that Appellant had not complied with Article 44.08 (c), V.A.A.C.P., [1/] which requires that an appeal be made within ten days. Even though the trial court found good cause to permit the filing of late notice of appeal under Article 44.08 (e) V.A.C.C.P., such permission did not comply with

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1/ Art. 44.08 Notice of appeal.
(a) It shall be necessary for defendant, as a condition of perfecting an appeal to the Court of Criminal Appeals, to give notice of appeal. This notice may be given orally in open court or may be in writing filed with the clerk. Such notice shall be sufficient if it shows the desire of defendant to appeal from the conviction to the Court of Criminal Appeals.
(b) In cases where the death penalty has been assessed or in probation cases where imposition of sentence is suspended, such notice shall be given or filed within ten days after overruling of the motion or amended motion for new trial and if there be no motion or amended motion for new trial, then within ten days after entry of judgment on the verdict.
(c) In all other cases such notice shall be given or filed within ten days after sentence is pronounced.
(d) The record on appeal will be deemed sufficient to show notice of appeal was duly given if it contains written notice of appeal showing a date of filing within the time required by law of if the record...

statutory requirements. Under state law, when late notice of appeal is filed or given, good cause must be shown to the trial court through affidavits or sworn evidence as to why notice of appeal was not timely perfected. 2/

The requirement that Appellant comply with State appellate procedure is solely a non federal ground. The finding that Appellant did not comply with the time allowed for appeal nor the process for securing an extension of time to file said appeal for good cause is an adequate state basis for the decision of the Texas Court of Criminal Appeals.

II.

MOTION TO AFFIRM

C. APPELLANT'S APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

It is established that the presence of a material federal question in the case is essential as a jurisdictional basis for review of a state decision by the Supreme Court. New York, Chicago & St. Louis Railroad Co. v. Frank, 314 U.S. 360 (1971); Hunter Company, Inc. v. McHugh Commissioner of Conservation, et al., 320 U.S. 222 (1943). The alleged controversy must be one calling for serious attention. It must not be so absolutely devoid of merit as to be frivolous. Nor can it be so explicitly foreclosed by prior decisions of the Supreme Court as to leave no room for real controversy.

Appellant voluntarily elected the benefits of Article 42.12, § 3(d), V.A.C.C.P. By so doing Appellant avoided blemishing his record by an adjudication of guilt. Once the benefit of the statute was accepted, the possibility of a future adjudication of guilt became intertwined with that selection. The Appellant now seeks to appeal from the court's decision to proceed to a deter-

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2/ See, Morasco v. State, 503 S.W.2d 273 (Tex.Cr.App. 1973). Abron v. State, 531 S.W.2d 643 (Tex.Cr.App. 1976). McDonald v. State, 501 S.W.2d 11 (Tex.Cr.App. 1973) when an appeal after ten days is made the record must reflect an affidavit or sworn testimony to justify a finding of good cause. If the record fails to reflect such evidence the reviewing court may dismiss the appeal.

mination to adjudicate guilt, he does not challenge the actual adjudication and finding of guilt on the original charge.

It must be pointed out that Appellant has the right to appeal from his adjudication of guilt as would any person subject to the various types of probation enumerated in Article 42.12, V.A.C.C.P. The individual selects the deferred adjudication route. When he does so, he elects the entire statute not just the most favorable section.

Appellant has clearly failed to allege any substantial federal question. Any due process rights he has are protected by the statute's allowance of an appeal from a final adjudication of guilt. Appellant's negligence in filing a timely and proper appeal does not launch this dispute to the level of a substantial federal question.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this appeal by Appellant is not timely and properly filed; and that the decision below rests on adequate state grounds. The Appellee respectfully moves the Court to dismiss this petition, or, in the alternative, to affirm the judgment entered in the cause by the Texas Court of Criminal Appeals on the basis that no substantial federal question has been presented by Appellant.

Respectfully submitted,

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